

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

DERRICK TYRONE MYERS,
Petitioner,
v.
KATHY MENDOZA-POWERS,
Respondent.

No. EDCV 06-1221-JSL (AGR)

**ORDER ADOPTING MAGISTRATE
JUDGE'S REPORT AND
RECOMMENDATION**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the entire file de novo, including the Magistrate Judge's Report and Recommendation. The Court agrees with the recommendation of the magistrate judge.

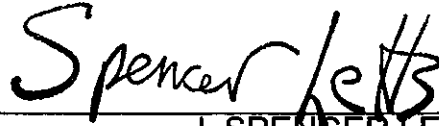
IT IS ORDERED that the Magistrate Judge's Report and Recommendation is adopted.

IT IS FURTHER ORDERED that (1) a conditional writ of habeas corpus is granted as to Ground One; (2) Respondent shall permit Petitioner to withdraw his plea in San Bernardino County Superior Court Case No. FSB041428, or shall release Petitioner from custody, within sixty (60) days of the date the Judgment herein becomes final, plus any additional delay authorized under state law; and (3) the Petition is otherwise denied.

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1 IT IS FURTHER ORDERED that Judgment be entered accordingly.
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4 DATED: Dec 15, 2008



J. SPENCER LETTS
UNITED STATES DISTRICT JUDGE

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 DERRICK TYRONE MYERS,
12 Petitioner,

13 v.

14 KATHY MENDOZA-POWERS,
15 Warden,
16 Respondent.
17

NO. EDCV 06-1221-JSL (AGR)

REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

18 The Court submits this Report and Recommendation to the Honorable J.
19 Spencer Letts, United States District Judge, pursuant to 28 U.S.C. § 636 and
20 General Order No. 05-07 of the United States District Court for the Central District
21 of California. For the reasons set forth below, the Magistrate Judge recommends
22 the Petition for Writ of Habeas Corpus be granted.

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I.

SUMMARY OF PROCEEDINGS

Petitioner pled guilty to robbery and petty theft with a prior. On August 9, 2004, Petitioner was sentenced to 11 years, 4 months in state prison. (Lodged Document "LD" 2 at 50.) On June 15, 2005, the California Court of Appeal modified the sentence to ten years and otherwise affirmed the judgment. (LD 7.)

On September 30, 2005, the California Supreme Court granted the petition for review. (LD 11.) On remand, the California Supreme Court ordered the Director of Corrections to show cause "why trial counsel was not ineffective in advising petitioner to enter a guilty plea to the charge of robbery in light of the lack of evidence to support the robbery charge, and why petitioner should not be allowed to withdraw his guilty plea to robbery." (*Id.*)

On February 14, 2006, the trial court, on remand, did not conduct an evidentiary hearing. The trial court found that "the crime [of robbery] had in fact not been committed by the Petitioner." (LD 16 at 2.) The trial court found that "Petitioner entered his plea to the robbery against counsel's advice." (*Id.*) "Trail (sic) counsel was not ineffective and did all in his power to persuade the Petitioner not to agree to the robbery charge." (*Id.* at 3.) Petitioner did not follow counsel's advice because of "his own eager desire to be temporarily released from custody." (*Id.* at 2.)

On April 6, 2006, the California Court of Appeal denied the petition for writ of habeas corpus without explanation. (LD 18.) On June 21, 2006, the California Supreme Court denied the petition for review. (LD 20.)

On November 7, 2006, Petitioner filed a Petition for Writ of Habeas Corpus By a Person in State Custody ("Petition") in this Court pursuant to 28 U.S.C. § 2254. The Petition states two grounds: (1) ineffective assistance of counsel; and (2) a coercive plea agreement. (Petition at 5 & Attachment #10.) On February 12, 2007, Respondent filed an answer that admitted both claims are exhausted,

1 as Respondent understands the claims. (Answer at 2.) On March 13, 2007,
2 Petitioner filed a Reply.

3 On May 16, 2008, the Court granted Petitioner's request for an evidentiary
4 hearing. (Dkt. No. 13.) A status conference was held on June 12, 2008. (Dkt.
5 No. 16.) On September 10, 2008, the Court conducted an evidentiary hearing.
6 On October 6, 2008, Respondent filed a Notice of Supplemental Authority.

7 This matter has been taken under submission and is now ready for
8 decision.

9 II.

10 **STATEMENT OF FACTS**

11 **A. Facts of Underlying Crime**

12 Below are the facts set forth in the California Court of Appeal decision on
13 direct review. To the extent an evaluation of Petitioner's claims for relief depends
14 on an examination of the record, the Court has made an independent evaluation
15 of the record specific to Petitioner's claims for relief.

16 On October 13, 2003, a San Bernardino Rite Aid drug store security officer,
17 Thomas Rhodes, detained defendant as he exited the store when an
18 antitheft device located at the entrance activated. Rhodes noticed that
19 defendant's waistband appeared "bulky" and asked defendant what he had.
20 Defendant reached into his right rear pocket and removed two canisters of
21 deodorant.

22 Defendant was escorted back into the store by Rhodes and the store
23 manager, Olin Thrower. Once inside the store, Rhodes and Thrower told
24 defendant to empty his pockets. Defendant reached into the front of his
25 pants and removed six more canisters of deodorant.

26 Defendant pleaded with Rhodes not to call the police. When defendant
27 became agitated and tried to flee, Rhodes wrestled him to the ground and
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1 handcuffed him. San Bernardino Police Officer Mary Yanez responded to
2 the scene and took defendant into custody.

3 (LD 7 at 3-4.)

4 **B. State Proceedings**

5 On October 15, 2003, Petitioner was charged with felony petty theft with a
6 prior. (LD 2 at 1-2.)

7 **1. Preliminary Hearing**

8 A preliminary hearing was held on November 10, 2003. (*Id.* at 12.) In
9 addition to Count 1, the prosecutor asked the Court to hold Petitioner to answer
10 to a violation of Cal. Penal Code § 211 (robbery). (*Id.* at 23.) However, the court
11 held Petitioner to answer only on Count 1. (*Id.*)

12 **2. Information Adding Robbery Count**

13 On November 13, 2003, an information was filed against Petitioner adding
14 a charge of robbery as Count 2. (*Id.* at 28-31.) Myers' counsel, William Dole,
15 never filed a motion to dismiss the robbery count under Cal. Penal Code § 995.
16 At the evidentiary hearing, Dole testified that the preliminary hearing evidence
17 was insufficient to establish probable cause for robbery. (Tr. at 11:20-25, 13:25-
18 14:6.)¹ Dole intended to file a motion to dismiss under § 995.² (*Id.* at 16:7-17.)
19 Dole could not explain why he did not file the motion.³ (*Id.* at 16:18-22.)

20 **3. Rejection of Plea Offer at Trial Readiness**

21 On January 9, 2004, the matter came on for trial readiness. (LD 2 at 35.)
22 The prosecutor offered a plea of guilty to Count 1 for 16 months, admit one strike
23 and double the term to 32 months, and Count 2 (robbery) would be dismissed.

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25 ¹ "Tr." refers to the reporter's transcript of the evidentiary hearing dated
26 September 10, 2008.

27 ² Dole's handwritten notes in Petitioner's case file referenced a 995
28 motion. (Exh. 20 at 5; Tr. at 41:15-23.)

³ Dole testified "I had a number of cases I was involved in." (Tr. at 16:20.)

1 (LD 1 at 2-3.) Petitioner responded:

2 P: May I ask a question? There was never a robbery. That's been –

3 Court: Mr. Myers, that's what's alleged on the Information.

4 P: No, there was never –

5 (*Id.* at 3.) The court asked: "Mr. Myers, they're offering you 32 months. Do
6 you want it or not? Petitioner responded, "No, sir." (*Id.* at 4.) Defense counsel
7 stated that Petitioner wanted two years with no strike. (*Id.* at 2.)

8 **4. Written Plea Agreement**

9 On January 20, 2004, the parties notified the court that there was a signed
10 plea bargain. (LD 2 at 38.) The written plea agreement provided that Petitioner
11 "freely and voluntarily" entered into the plea "[b]ecause I am guilty . . . and"
12 "[b]ecause the district attorney agreed" to certain sentencing terms. (*Id.* at 45.)

13 Petitioner's attorney, Dole, signed the plea agreement. (*Id.* at 46.) The
14 attorney statement on the plea agreement provided, among other things, that "I
15 concur in the defendant's withdrawal of his plea of not guilty; and that I concur in
16 the defendant's plea of guilty and/or admissions to the charge(s) as set forth by
17 the defendant in the above declaration." (*Id.*) The matter was continued to April
18 12, 2004. (*Id.* at 38, 45-46.)

19 **5. Plea Hearing**

20 The plea hearing took place on April 12, 2004. Dole did not appear. (LD 1
21 at 5.) The court stated: "Listen, I need a public defender or somebody. Maybe
22 they can stand in for Mr. Dole for purposes of this plea agreement on Mr. Myers."
23 (*Id.*) Petitioner agreed. (*Id.*) A person identified as Mr. Poston indicated that
24 "[t]here's a couple in the hallway. I'll –" (*Id.* at 6.)

25 In the plea hearing transcript, there is no mention of an attorney appearing
26 for Petitioner at the plea hearing until page 11 of the transcript, when the court
27 addressed Steve Bremser after Petitioner pleaded guilty. (*Id.* at 11.) However, at

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1 the evidentiary hearing, Bremser testified that he appeared at the plea hearing
2 starting with page 6, line 7. (Tr. at 100:2-9.)

3 In the plea hearing transcript, when the court inquired whether Bremser
4 joins in the plea agreement, Bremser asked who signed the agreement. The
5 court responded, "Mr. Dole." Mr. Bremser then joined in the plea agreement "[o]n
6 behalf of Mr. Dole." (LD 1 at 11.)

7 The court found that counsel joined in the plea agreement. (*Id.* at 13.) The
8 court further found that a preliminary hearing established the factual basis for the
9 entry of the plea. (*Id.*) The court indicated, however, that the agreed upon 11
10 year, 4 month term in the plea agreement was above the maximum sentence
11 because of a merger of the two counts, which arose from the same incident. The
12 court "round[ed] it off at ten years." (*Id.* at 14-15.) The court sentenced Petitioner
13 to 10 years in state prison on Count 2 (the upper term for robbery) and a
14 concurrent sentence of 4 years on Count 1 (the mid-term for petty theft with a
15 prior), with no explanation as to why the court chose the upper term for robbery.
16 (*Id.* at 15.) The Court stayed execution of the sentence to May 20, 2004. (*Id.* at
17 16.) The court stated that if Petitioner returned on May 20, 2004 and complied
18 with the probation office's requirements, his sentence would be reduced to 32
19 months.⁴ (*Id.*) There was no audible response from Petitioner. (*Id.*) Petitioner
20 signed an agreement to appear on May 20, 2004. (LD 2 at 42-43.)

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26 ⁴ Under a *Vargas* waiver, a defendant is released from custody pending
27 sentencing. The defendant waives the right to withdraw his or her plea upon
28 failure to appear at sentencing and agrees that a specified longer prison term
may be imposed in the event of a failure to appear. *People v. Vargas*, 223 Cal.
App. 3d 1107, 273 Cal. Rptr. 48 (1990).

1 **6. Sentencing Hearing I**

2 On May 20, 2004, Petitioner was in court at 8:30 a.m. at first calendar call
3 but was not present when the matter was called at 9:27 a.m.⁵ A bench warrant
4 was issued. (*Id.* at 47.)

5 **7. Sentencing Hearing II**

6 On August 9, 2004, Petitioner was represented by Kyung Kim. Petitioner
7 admitted violating the *Vargas* waiver and waived his right to a hearing. (LD 1 at
8 19.) The court erroneously sentenced him to 11 years, 4 months.⁶ (LD 2 at 50.)
9 In the event the Court of Appeal reversed the upper term under *Blakely*, the court
10 imposed an alternative sentence based on the mid term of 7 years, 4 months.
11 (*Id.* at 51; LD 1 at 20.)

12 **8. State Habeas**

13 On September 28, 2005, on state habeas, the California Supreme Court
14 transferred the matter to the Court of Appeal to issue an order to show cause,
15 returnable before the Superior Court, "why trial counsel was not ineffective in
16 advising petitioner to enter a guilty plea to the charge of robbery in light of the
17 lack of evidence to support the robbery charge, and why petitioner should not be
18 allowed to withdraw his guilty plea to robbery." (LD 11.)

19 The state courts' decisions on remand are the subject of the Petition before
20 this Court.

21 **III.**

22 **STANDARD OF REVIEW**

23 A federal court may not grant a petition for writ of habeas corpus by a
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25 ⁵ Petitioner testified that he reported to probation but became homeless
26 and there was no way for probation to contact him for an interview. (Tr. at 159:5-
27 14.) A declaration by Mark Shoup, an attorney, indicates that, on May 20, 2004
before the hearing, he told Petitioner that the probation office recommended a
longer prison sentence than the agreed-upon 32 months. (LD 4, Exh. C.)

28 ⁶ On direct appeal, the Court of Appeal corrected the sentence to 10
years. (LD 7 at 7-8.)

1 person in state custody with respect to any claim that was adjudicated on the
 2 merits in state court unless it (1) “resulted in a decision that was contrary to, or
 3 involved an unreasonable application of, clearly established Federal law, as
 4 determined by the Supreme Court of the United States”; or (2) “resulted in a
 5 decision that was based on an unreasonable determination of the facts in light of
 6 the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d);
 7 *Woodford v. Visciotti*, 537 U.S. 19, 21, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002)
 8 (per curiam).

9 “[C]learly established Federal law’ . . . is the governing legal principle or
 10 principles set forth by the Supreme Court at the time the state court rendered its
 11 decision.” *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed.
 12 2d 144 (2003). A state court’s decision is “contrary to” clearly established
 13 Federal law if (1) it applies a rule that contradicts governing Supreme Court law;
 14 or (2) it “confronts a set of facts . . . materially indistinguishable” from a decision
 15 of the Supreme Court but reaches a different result. *Early v. Packer*, 537 U.S. 3,
 16 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002). A state court’s decision cannot be
 17 contrary to clearly established Federal law if there is a “lack of holdings from” the
 18 Supreme Court on a particular issue. *Carey v. Musladin*, 549 U.S. 70, 77, 127 S.
 19 Ct. 649, 166 L. Ed. 2d 482 (2006).

20 Under the “unreasonable application prong” of section 2254(d)(1), a federal
 21 court may grant habeas relief “based on the application of a governing legal
 22 principle to a set of facts different from those of the case in which the principle
 23 was announced.” *Lockyer*, 538 U.S. at 76; see also *Woodford*, 537 U.S. at 24-26
 24 (state court decision “involves an unreasonable application” of clearly established
 25 federal law if it identifies the correct governing Supreme Court law but
 26 unreasonably applies the law to the facts).

27 A state court’s decision “involves an unreasonable application of [Supreme
 28 Court] precedent if the state court either unreasonably extends a legal principle . .

1 . to a new context where it should not apply, or unreasonably refuses to extend
2 that principle to a new context where it should apply.” *Williams v. Taylor*, 529
3 U.S. 362, 407, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

4 “In order for a federal court to find a state court’s application of [Supreme
5 Court] precedent ‘unreasonable,’ the state court’s decision must have been more
6 than incorrect or erroneous.” *Wiggins v. Smith*, 539 U.S. 510, 520-21, 123 S. Ct.
7 2527, 156 L. Ed. 2d 471 (2003) (citation omitted). “The state court’s application
8 must have been ‘objectively unreasonable.’” *Id.* (citation omitted); see also *Clark*
9 *v. Murphy*, 331 F.3d 1062, 1068 (9th Cir.), *cert. denied*, 540 U.S. 968 (2003).

10 “Factual determinations by state courts are presumed correct absent clear
11 and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated
12 on the merits in a state court and based on a factual determination will not be
13 overturned on factual grounds unless objectively unreasonable in light of the
14 evidence presented in the state-court proceeding, § 2254(d)(2).” *Miller-El v.*
15 *Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

16 In applying these standards, this Court looks to the last reasoned State
17 court decision. *Davis v. Grigas*, 443 F.3d 1155, 1158 (9th Cir. 2006). To the
18 extent no such reasoned opinion exists, as when a state court rejected a claim in
19 an unreasoned order, this Court must conduct an independent review to
20 determine whether the decisions were contrary to, or involved an unreasonable
21 application of, “clearly established” Supreme Court precedent. *Delgado v. Lewis*,
22 223 F.3d 976, 982 (9th Cir. 2000). If the state court declined to decide a federal
23 constitutional claim on the merits, this Court must consider that claim under a *de*
24 *novo* standard of review rather than the more deferential “independent review” of
25 unexplained decisions on the merits authorized by *Delgado*. *Lewis v. Mayle*, 391
26 F.3d 989, 996 (9th Cir. 2004) (standard of *de novo* review applicable to claim
27 state court did not reach on the merits).

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IV.

GROUND ONE: INEFFECTIVE ASSISTANCE OF COUNSEL

"The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

When, as here, a defendant alleges ineffective assistance of counsel during a plea process, the two-part test in *Strickland* applies. *Wright v. Van Patten*, 128 S. Ct. 743, 746, 169 L. Ed. 2d 583 (2008); *Hill*, 474 U.S. at 57-58. First, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 56, 58. In other words, "the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Id.* (citation omitted).

Second, in the context of guilty pleas, the prejudice requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. A petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* For example, when counsel's alleged error is failure to advise a defendant of a potential affirmative defense, "the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Id.* This inquiry should be made objectively.⁷ *Id.* at 60.

The petitioner bears the burden of establishing both deficient performance and prejudice. *Williams*, 529 U.S. at 390-91; *Smith v. Robbins*, 528 U.S. 259, 285-86, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). The Court need not address

⁷ It is unnecessary to conduct a harmless error review for *Strickland* claims. *Avila v. Galaza*, 297 F.3d 911, 918 n.7 (9th Cir. 2002), *cert. denied*, 538 U.S. 919 (2003).

1 both components if Petitioner makes an insufficient showing on one. *Strickland*,
2 474 U.S. at 694.

3 There is a narrow exception to *Strickland*'s requirement of prejudice. The
4 exception applies "when . . . the likelihood that any lawyer, even a fully
5 competent one, could provide effective assistance is so small that a presumption
6 of prejudice is appropriate without inquiry into the actual conduct of the trial."
7 *Wright*, 128 S. Ct. at 746 (citation omitted). "[O]ne circumstance warranting the
8 presumption is the 'complete denial of counsel,' that is, when 'counsel [is] either
9 totally absent, or prevented from assisting the accused during a critical stage of
10 the proceeding.'" *Id.* (citations omitted). In *Wright*, the Supreme Court held that
11 counsel's participation in the plea hearing by speaker phone did not constitute a
12 complete denial of counsel. *Id.*

13 Under a claim of ineffective assistance of counsel, issues of counsel's
14 deficient performance and prejudice are mixed questions of law and fact that are
15 not entitled to a presumption of correctness. *Strickland*, 466 U.S. at 698. Such
16 legal conclusions are evaluated to determine whether the state court decision is
17 contrary to, or an unreasonable application of, clearly established Supreme Court
18 precedent. 28 U.S.C. § 2254(d)(1); *Weaver v. Palmateer*, 455 F.3d 958, 965 (9th
19 Cir. 2006) ("we review for objective unreasonableness the state court's
20 conclusions as to whether counsel's performance was deficient or resulted in
21 prejudice"), *cert. denied*, 128 S. Ct. 177 (2007); *Lambert v. Blodgett*, 393 F.3d
22 943, 978 (9th Cir. 2004), *cert. denied*, 546 U.S. 963 (2005).

23 However, the state court's factual findings made in the course of resolving
24 claims of ineffective assistance of counsel are entitled to a presumption of
25 correctness. *Id.* at 977. When, as here, the Court has held an evidentiary
26 hearing at which new evidence was admitted, factual determinations by state
27 courts are presumed correct absent clear and convincing evidence to the
28 contrary. 28 U.S.C. § 2254(e)(1). The findings cannot be overturned unless the

1 state court findings constitute unreasonable determinations of the facts. *Id.* §
2 2254(d)(2).

3 Accordingly, a court's first task is to "separate the legal conclusions from
4 the factual determinations that underlie it." *Lambert*, 393 F.3d at 977-78.

5 Petitioner alleges ineffective assistance of counsel at two stages of the
6 proceedings:

- 7 (1) At the plea stage, Petitioner contends that he signed the plea
8 agreement on January 20, 2004, based on Dole's deficient advice. At
9 the plea hearing on April 12, 2004, Petitioner received no advice as to
10 whether to enter a guilty plea because Dole did not show up.
11 Bremser did not know Petitioner's case and gave no advice as to
12 whether he should enter a guilty plea.
- 13 (2) At the sentencing hearing on August 9, 2004, Kim was deficient in
14 advising Petitioner not to file a motion to withdraw his plea.⁸

15 **A. Deficient Performance**

16 This is an unusual case in that Petitioner relies on the transcript of the plea
17 hearing and the written plea agreement, and Respondent is left to rely on
18 subsequent contradictory statements by counsel.

19 The trial court made factual findings that (1) "Petitioner entered his plea to
20 the robbery against counsel's advice"; and (2) "Trail (sic) counsel . . . did all in his
21 power to persuade the Petitioner not to agree to the robbery charge." (LD 16 at
22 2-3.)

23 The state court's fact-finding process is undermined when the state court
24 has before it, yet apparently ignores, evidence that supports Petitioner's claim.
25 *Miller-El*, 537 U.S. at 346. In this case, the state court's failure is compounded by
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27 ⁸ Because this Court finds ineffective assistance of counsel at the plea
28 stage, it is unnecessary to address the ineffective assistance of counsel at the
sentencing stage.

1 a legal standard that accords Petitioner's evidence significant weight. See *Taylor*
2 *v. Maddox*, 366 F.3d 992, 1001 (9th Cir.) (state court findings made under a
3 misapprehension as to correct legal standard), *cert. denied*, 543 U.S. 1038
4 (2004). In addition, when, as here, "a state court makes evidentiary findings
5 without holding a hearing and giving petitioner an opportunity to present
6 evidence, such findings clearly result in an 'unreasonable determination' of the
7 facts." *Id.* Thus, "[a] federal court can disagree with a state court's credibility
8 determination and, when guided by the AEDPA, conclude the decision was
9 unreasonable." *Id.* at 1000 (citation and quotation marks omitted).

10 At Petitioner's plea hearing, the court expressly found that Petitioner's plea
11 was "joined by their counsel." (LD1 at 13.) The court's finding was based on
12 counsel's representation on the record that "On behalf of Mr. Dole, I so join." (*Id.*
13 at 11.) The written plea agreement contains an "attorney statement," signed by
14 Dole, that "I concur in the defendant's withdrawal of his plea(s) of not guilty; and
15 that I concur in the defendant's plea(s) of guilty and/or admissions to the
16 charge(s) as set forth by the defendant in the above declaration." (LD 2 at 46.)

17 The state habeas court's decision completely ignored these factual findings
18 made at the plea hearing, which supported Petitioner's claim that his counsel
19 advised him to take the plea. See *Miller-El*, 537 U.S. at 346. The Supreme Court
20 has stated that findings made by the judge accepting the plea "constitute a
21 formidable barrier in any subsequent collateral proceedings. Solemn declarations
22 in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431
23 U.S. 63, 74, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977). Courts generally credit
24 statements made at the plea hearing over subsequent contrary assertions. See
25 *Womack v. McDaniel*, 497 F.3d 998, 1004 (9th Cir. 2007) (citing *United States v.*
26 *Rivera-Ramirez*, 715 F.2d 453, 458 (9th Cir. 1983)), *cert. denied*, 128 S. Ct. 928
27 (2008).

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1 The state court's fact-finding process was defective in that it made contrary
2 findings without holding an evidentiary hearing, and without giving Petitioner an
3 opportunity to present evidence and examine witnesses. The state habeas court
4 had before it three different versions of counsel's advice: (1) counsel's
5 contemporaneous joinder in the plea as set forth above in the plea hearing
6 transcript dated April 12, 2004, and written plea agreement dated January 20,
7 2004; (2) Dole's statement to Petitioner's counsel on December 14, 2004, that he
8 could not recall Petitioner's case (LD 4, Exh. E at 2); and (3) Dole's declaration to
9 Respondent's counsel after remand from the California Supreme Court, which
10 disclosed for the first time that "I told Mr. Myers not to take the plea bargain." (LD
11 13, Exh. 1 ¶ 5, dated December 21, 2005.)

12 Respondent argues that Petitioner invited the trial court's error by arguing
13 that the trial court could grant the state habeas petition based on the pleadings
14 alone. However, Respondent misreads Petitioner's brief. Petitioner clearly
15 stated that "[i]f the court . . . believes it is essential to resolve the question
16 concerning the advice that Mr. Dole gave petitioner, the court should order an
17 evidentiary hearing." (LD 15 at 16.) In Petitioner's view, the court could grant the
18 habeas writ "without definitely deciding that question" by relying on Dole's
19 signature on the plea agreement and the fact that Petitioner "had the appearance
20 but not the reality of the assistance of counsel" at the plea hearing due to
21 Bremser's admitted ignorance of the case. (*Id.* at 15-16.) The trial court did not
22 accept Petitioner's invitation and, therefore, should have held an evidentiary
23 hearing to resolve the question of what counsel advised Petitioner.

24 Moreover, the newly admitted evidence at the evidentiary hearing here
25 constitutes clear and convincing proof that the state habeas court's factual finding
26 that trial counsel advised Petitioner not to take the plea bargain was in error.

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1 At the evidentiary hearing, Bremser (the attorney who stood in for Dole at
2 the plea hearing) testified to three material points. First, Bremser confirmed that
3 he represented to the trial court that counsel joined in the plea. (Tr. at 86:24-25.)
4 Dole told Bremser that he signed the plea agreement and asked Bremser to have
5 the court approve the plea. (*Id.* at 82:14-21.)

6 Second, Bremser did not recall Dole saying that he advised against the
7 plea. (*Id.* at 93:24-94:1) Bremser testified that, had he known Dole advised
8 against the plea, Bremser's approach at the plea hearing would have been
9 different. (*Id.* at 94:2-4.) Dole testified that he did not recall speaking to Bremser.
10 (*Id.* at 35:23-36:1.) Dole identified his handwritten notes in Petitioner's case file
11 (Exh. 20), which is available to other public defenders who represent Petitioner.
12 (Tr. at 41:15-23, 58:8-19, 78:22-79:6.) There is no handwritten notation that Dole
13 advised against the plea. (Exh. 20 at 3.)

14 Third, Bremser came to the plea hearing without knowing the facts of the
15 alleged crimes, and without having reviewed the preliminary hearing transcript or
16 police report. (Tr. at 84:24-85:8.) Bremser did not advise Petitioner whether or
17 not to enter into the guilty plea. (*Id.* at 96:8-19, 103:13-23.) Bremser testified that
18 had he known the facts of the case, it would have changed the way he handled
19 the case and would have prompted him to discuss with Petitioner "whether it was
20 a good idea to enter into the plea bargain agreement or not." (*Id.* at 93:14-23.)
21 Accordingly, the state court's finding that trial counsel advised against the plea is
22 indisputably incorrect as to Bremser.

23 The first time Dole disclosed that he allegedly advised against the plea was
24 in a declaration after the California Supreme Court's remand. Dole's statement
25 that he advised against the plea bargain is not credible and cannot be squared
26 with the evidence. As discussed above, Dole signed the plea agreement. (LD 2
27 at 46.) Dole wrote in the case file that "we fill out plea bargain" and made no
28 notation that he had advised Petitioner not to take the plea bargain. (Exh. 20 at

1 4.) On cross-examination, Dole testified that he did not record every single
2 communication and the details of every transaction. (Tr. at 52:3-15.) However,
3 advising a defendant against a plea is not a detail or immaterial. Other notations
4 in the case file indicated when an event occurred over the attorney's objection.
5 (E.g., Exh. 20 at 1, 4, 6.) In addition, Dole did not tell Bremser orally that he
6 advised against the plea. Bremser represented to the court (and Petitioner) on
7 the record at the plea hearing that counsel joined in the plea. (LD 1 at 11.) Dole
8 did not explain why he did not communicate orally or in writing that he had
9 advised against the plea, or why he put his colleague in a position to
10 misrepresent to the court and Petitioner that counsel joined in the plea. Counsel
11 certainly could have told the court that he did not join in the plea. See, e.g.,
12 *People v. Lovings*, 118 Cal. App. 4th 1305, 1309, 13 Cal. Rptr. 3d 710 (2004)
13 (counsel stated on the record that he refused to join in the plea). The sequence
14 of events in this case makes sense only if Dole advised Petitioner to take the plea
15 – it makes no sense if Dole advised against the plea.

16 The Court observed Dole's demeanor at the evidentiary hearing and the
17 inconsistencies in his testimony. (E.g., Tr. at 50:2-19, 52:25-53:17, 65:1-12, 67:7-
18 22.) For example, Dole testified that the prosecutor came up with the idea of the
19 plea bargain with a *Vargas* waiver when he and Petitioner showed up for trial.
20 (*Id.* at 28:4-31:6, 50:2-7.) On the other hand, Dole acknowledged telling
21 Respondent's counsel that he (Dole) told the prosecutor that Petitioner wanted
22 out of custody as part of a plea **before** the prosecutor offered the plea bargain.
23 (*Id.* at 50:8-19, 70:13-23.) If Dole had actually proposed that idea to the
24 prosecutor, it would be inconsistent with Dole's testimony that he "unfortunately"
25 had to tell his client about a plea bargain with a *Vargas* waiver that he viewed as
26 being "very dangerous." (*Id.* at 31:21-32:2, 50:20-25, 70:8-72:13.)

27 Accordingly, the state habeas court's findings that counsel advised against
28 the plea bargain and did all he could to convince Petitioner not to plead guilty was

1 “an unreasonable determination of the facts in light of the evidence presented in
2 the State court proceeding.”⁹ 28 U.S.C. § 2254(d)(2). The state habeas court’s
3 findings were rebutted by clear and convincing evidence. *Id.* § 2254(e)(1).

4 Because of its factual findings, the state court did not address whether
5 counsel’s advice to take the plea agreement was deficient. See *Panetti v.*
6 *Quarterman*, 127 S. Ct. 2842, 2858-59, 168 L. Ed. 2d 662 (2007).

7 As noted above, “the voluntariness of the plea depends on whether
8 counsel’s advice ‘was within the range of competence demanded of attorneys in
9 criminal cases.’” *Hill*, 474 U.S. at 56 (citation omitted). Petitioner has satisfied his
10 burden. It was deficient for counsel to advise Petitioner to enter into the plea
11 agreement. The plea required Petitioner to plead guilty to the most serious
12 charge with the longest prison sentence, for a robbery he did not commit.¹⁰ (LD
13 16 at 2; Tr. at 11:20-25, 13:25-14:6.) The plea contained a *Vargas* waiver with a
14 maximum sentence greater than Petitioner could have received had he (1) gone
15 to trial, lost on all counts, and received the maximum upper term prison sentence
16 of 10 years; or (2) gone to trial, lost on all counts and received the mid-term
17 prison sentence of 6 years; or (3) gone to trial, lost only on petty theft with a prior,

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19 ⁹ Dole also appeared to acknowledge that he could have attempted to
20 convince Petitioner not to plead guilty after Petitioner signed the plea agreement.
21 (Tr. at 37:15-22.) Dole did not do so. (*Id.* at 35:16-18; LD 21 ¶ 6; Exh. 20.) “[A]
22 plea bargain is ineffective unless and until it is approved by the court.” *In re*
23 *Alvernaz*, 2 Cal. 4th 924, 941, 8 Cal. Rptr. 713 (1992). A defendant is free to
24 withdraw from a plea agreement before it is approved by the court. *People v.*
25 *Anderson*, 129 Cal. App. 3d 491, 495, 181 Cal. Rptr. 68 (1982) (“If the defendant
26 had changed his mind and had been unwilling to waive his constitutional rights,
27 the court could not have imposed the bargain over his objection.”). A plea is
28 “accepted and final only at the moment that the judge made the requisite factual
findings and accepted the plea.” *Brown v. Poole*, 337 F.3d 1155, 1159 (9th Cir.
2003) (interpreting California law).

¹⁰ This was not a plea under *People v. West*, 3 Cal. 3d 595, 91 Cal. Rptr.
385 (1970). In the plea agreement, the box was crossed out for a plea of guilty
“[a]s a result of plea bargaining after discussing with my attorney the possibility of
my being convicted on other or more serious charges and/or risking the possibility
of a longer sentence.” (LD 2 at 45 ¶ 9b.) In Petitioner’s case, he was pleading
guilty to all charges, robbery was the most serious charge, and robbery carried
the longest prison sentence.

1 Even assuming that the state court's finding is entitled to deference,¹¹
2 Petitioner has satisfied his burden of rebutting the finding with clear and
3 convincing evidence that counsel's "constitutionally ineffective performance
4 affected the outcome of the plea process." *Hill*, 474 U.S. at 59. Bremser testified
5 at the evidentiary hearing that, had he known the facts of the case, it would have
6 changed the way he handled the case and would have prompted him to discuss
7 with Petitioner "whether it was a good idea to enter into the plea bargain
8 agreement or not." (Tr. at 93:14-23.)

9 Bremser's testimony makes sense in light of the plea agreement's terms.
10 The shortcomings of a plea agreement may show "that [the defendant] made the
11 unfavorable plea on the constitutionally defective advice of counsel." *Bradshaw*
12 *v. Stumpf*, 545 U.S. 175, 186, 125 S. Ct. 2398, 162 L. Ed. 2d 1143 (2005). At the
13 evidentiary hearing, Dole admitted that the maximum prison sentence under the
14 plea agreement – 11 years, 4 months – was **longer** than (1) the maximum 10-
15 year prison sentence Petitioner could have received had he gone to trial, lost on
16 all counts (including robbery), and been sentenced to the upper term; and (2) the
17 maximum 6-year prison sentence Petitioner could have received had he gone to
18 trial, lost on petty theft with a prior (but not robbery), and been sentenced to the
19 upper term. (Tr. at 21:24-22:6, 70:3-8.)

20 At the evidentiary hearing, Dole testified that he advised Petitioner to turn
21 down an earlier, more favorable plea offer for a maximum prison term of 32
22 months, and Petitioner did so. (*Id.* at 23:14-24:17.)

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24
25 ¹¹ The state court did not analyze the prejudice prong based on the
26 premise that counsel advised Petitioner to enter into the plea agreement. (LD
27 16.) Therefore, it is arguable that federal habeas review is not circumscribed by
28 the state court's conclusion as to prejudice. See *Wiggins*, 539 U.S. at 534; *Id.* at
528-29. However, because the outcome is the same whether or not the state
court's factual finding is accorded deference, this Court will assume the state
court is entitled to deference.

1 There is no evidence in the record that Petitioner sought temporary release
 2 from custody for a specific reason, such as a family emergency or to attend a
 3 funeral. At the evidentiary hearing, Dole testified that Petitioner was dressed for
 4 trial and prepared to proceed to trial on the trial date. (*Id.* at 31:10-15, 55:20-22.)
 5 Petitioner also testified that he was prepared to go to trial. (*Id.* at 124:12-19.)

6 The trial court relied solely on a defendant's general desire to be released.
 7 At the evidentiary hearing, Dole testified: "Like I think anybody wants to get out of
 8 custody," including Petitioner. (*Id.* at 49:3-11.) Dole testified that, out of the 3000
 9 clients he had over his career, only one did not want to get out of custody. (*Id.* at
 10 48:14-24.) This argument, however, would render any plea agreement that
 11 includes a *Vargas* waiver immune from challenge because the temporary release
 12 from custody would automatically preclude a finding of prejudice.¹² Petitioner
 13 agreed that he wanted to be released from custody, meaning "I wanted less time
 14 in prison." (*Id.* at 140:21-24.) A *Vargas* waiver does not mean less time in prison
 15 and, in fact, carries with it a risk of a much longer term in prison.

16 Unlike the state court, this Court had the opportunity to observe Petitioner's
 17 demeanor at the evidentiary hearing. Petitioner testified that he reads at the third
 18 grade level according to prison testing and that he completed the sixth grade at
 19 school. (*Id.* at 120:23-121:2.) Petitioner testified that he did not want the plea
 20 deal, and that he did not want to go to prison for that long. (*Id.* at 123:3-25,
 21 125:2-4, 151:9-13.) However, Dole said "[t]o take the deal and go home."¹³ (*Id.*
 22 at 125:2-6, 151:14-15.) If Dole had told him not to take the deal, Petitioner

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 24 ¹² Moreover, temporary release from custody pending sentencing may be
 25 obtained without a *Vargas* waiver in a plea agreement. See *People v. Murray*, 32
 Cal. App. 4th 1539, 1545, 39 Cal. Rptr. 2d 7 (1995).

26 ¹³ In a January 13, 2006 declaration, Petitioner stated that "he wasn't
 27 extremely anxious to go home." (LD 15, Exh. A at 2.) The "only reason"
 28 Petitioner took the deal was because Dole told him to take it. (*Id.* at 2-3.) In a
 February 21, 2006, declaration, Petitioner stated that he "did not take the plea
 bargain, out of eagerness to go home" but "took the deal only because [Dole]
 recommended it, and otherwise I would have insisted on a trial." (LD 21 at 2.)

1 credibly testified that he would have turned it down and gone to trial.¹⁴ (*Id.* at
2 126:7-9.)

3 On this record, "there is at least a reasonable probability that . . .
4 [Petitioner] would have insisted on going to trial rather than pleading to the
5 offense to which he did." *Moore v. Czerniak*, 534 F.3d 1128, 1150 (9th Cir.
6 2008).¹⁵ Accordingly, Petitioner has established that he was prejudiced by his
7 counsel's deficiencies and is entitled to a writ on Ground One.

8 V.

9 GROUND TWO: COERCIVE PLEA BARGAIN

10 "A guilty plea operates as a waiver of important rights, and is valid only if
11 done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the
12 relevant circumstances and likely consequences.'" *Bradshaw*, 545 U.S. at 183
13 (citation omitted). "[T]he court taking a defendant's plea is responsible for
14 ensuring 'a record adequate for any review that may be later sought.'" *Id.* (citation
15 omitted).

16 "Where, as here, a defendant is represented by counsel during the plea
17 process and enters his plea upon the advice of counsel, the voluntariness of the
18 plea depends on whether counsel's advice 'was within the range of competence
19 demanded of attorneys in criminal cases.'" *Hill*, 474 U.S. at 56 (citation omitted).

20 Although Petitioner acknowledges he entered the plea based on advice of
21 counsel, he argues that the plea agreement is coercive as to an indigent
22 defendant based on the *Vargas* waiver in the plea agreement. (Reply at 25-27.)
23 Petitioner has not cited any case authority for the proposition that a *Vargas*
24 waiver is coercive. A state court's decision cannot be contrary to clearly

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26 ¹⁴ Bremser did not discuss with Petitioner why he was taking the plea
27 agreement. (Tr. at 87:4-7.) Bremser testified that he remembered Petitioner
28 saying that he had gone over the agreement with Dole. (*Id.* at 96:22-24.)

¹⁵ Petitioner could also establish prejudice if he would have obtained a
more favorable plea bargain. *Moore*, 534 F.3d at 1150 n. 26.

1 established Federal law if there is a "lack of holdings from" the Supreme Court on
2 a particular issue. *Carey*, 549 U.S. at 77; *Wright*, 128 S. Ct. at 747. Therefore,
3 federal habeas relief is unavailable for Ground Two.

4 VI.

5 **RECOMMENDATION**

6 For the reasons discussed above, it is recommended that the District Court
7 issue an Order (1) adopting this Report and Recommendation; (2) granting the
8 Petition with respect to Ground One; (3) denying the Petition in all other respects;
9 and (4) issuing a conditional writ of habeas corpus as follows: Within ninety days
10 of this judgment becoming final (meaning the conclusion of any and all appeals),
11 Respondent shall permit Petitioner to withdraw his plea in Los Angeles Superior
12 Court Case No. FSB041428, or shall release Petitioner from custody.

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14 DATED: November 17, 2008

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16 ALICIA G. ROSENBERG
17 United States Magistrate Judge
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NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing Duties of Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.